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IN THE

Supreme Court of the United States

UTILITY AIR REGULATORY GROUP,
Petitioner,

v.

STATE OF NEW YORK, ET AL.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the Utility Air Regulatory Group ("UARG") hereby incorporates by reference the disclosure statement filed with its petition for a writ of certiorari on November 27, 2006.

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INTRODUCTION

Respondents dismiss UARG's arguments as "irrelevant," asserting that *New York II* addressed "only the definition of 'physical change'" and not the definition of "modification." *See* Brief in Opposition for Respondents State of New York, *et al.* ("Opp.") at 20. As UARG explains in its petition, that is precisely why certiorari should be granted. The D.C. Circuit struck down the U.S. Environmental Protection Agency's ("EPA's") Equipment Replacement Provision ("ERP") rule under *Chevron* step one, finding unambiguous congressional intent in isolated words ("any physical change"), while specifically refusing to "decide whether parts replacements [allowed by the ERP rule] . . . necessarily constitute" a "modification" under the Clean Air Act ("CAA") definition of modification "taken as a whole." App. 15a.[1]

The D.C. Circuit's approach is a misapplication of *Chevron*, not a "routine application" of it. *See* Opp. at 6. Apparently cognizant of this weakness in *New York II*, Respondents proceed to defend that decision based on the statutory definition of modification and its history – precisely the approach the D.C. Circuit disavowed but should have taken to discern congressional intent. Thus, according to Respondents, "Congress clearly intended the *definition of modification* to encompass equipment replacement activities that cause more than a *de minimis* increase in [annual] emissions." Opp. at 6-7 (emphasis added). Respondents' analysis of the "modification" definition "as a whole," however, fails in two principal respects.

First, Respondents' argument establishes the relevance of the very issues of statutory construction currently before this

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[1] As originally enacted in 1970 in conjunction with the New Source Performance Standards ("NSPS") program, the CAA defines "modification" to mean "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source" or "which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4); CAA § 111(a)(4).

Court in *Environmental Defense v. Duke Energy Corp.*, No. 05-848 (argued Nov. 1, 2006). According to Respondents, *New York II* stands for the proposition that EPA lacks authority to define "modification" for New Source Review ("NSR") consistently with NSPS. *See, e.g.*, Opp. at 14. As a result, the mere finding in *Environmental Defense* that EPA has *authority* to define "modification" consistently across new source programs should lead to summary vacatur of *New York II*.

Second, Respondents' assertion that there is "nothing in the language of the statute or the legislative history to support" the claim that Congress in 1977 legislated in direct reference to the preexisting Prevention of Significant Deterioration ("PSD") rules promulgated in 1974, Opp. at 13, does not bear scrutiny. That Congress did so was previously recognized by the D.C. Circuit and is evident on the face of the CAA itself.

ARGUMENT

I. EPA IS NOT PRECLUDED BY THE CAA FROM DEFINING THE STATUTORY TERM "MODIFICATION" CONSISTENTLY FOR NSPS AND NSR.

Respondents argue that "[i]n issuing the [ERP] rule, EPA abandoned its longstanding interpretation of the statutory definition of modification." Opp. at 2. According to Respondents, EPA's longstanding interpretation of "modification" is reflected in "[r]egulations adopted in 1980," *id.* at 20, which define "major modification" as a source-wide increase in emissions in tons-per-year above specified regulatory thresholds (called "significance" levels). 40 C.F.R. § 52.21(b)(2).

Respondents' argument founders on its attempt to substitute the regulatory term "major modification" for the statutory term "modification." *See, e.g.*, Opp. at 2, 16 (claiming EPA's 1980 "major modification" rule is EPA's definition of "modification"). In this regard, no one disputes that EPA has always defined the statutory term "modification" under NSPS to

apply only to activity that increases emitting capacity, measured in terms of hourly rate unaffected by hours of operation. 40 C.F.R. § 60.14. Furthermore, no one disputes that EPA defined "modification" for PSD in 1974 consistent with NSPS. 40 C.F.R. § 52.01(d). Finally, no one disputes that the ERP rule fits well within these definitions of "modification," because the ERP rule excludes from NSR only projects that do not increase a facility's emitting capacity (measured in terms of hourly emission rate) by *any* amount. *See* UARG Petition at 10-11.

Respondents' only response is that "whatever was EPA's pre-1977 interpretation of 'modification' in the NSPS regulations, that interpretation . . . contravenes the plain statutory language." Opp. at 16. But that interpretation has been on the books unchallenged for over 30 years, and is a straightforward implementation of the congressional policy in the 1970 CAA that new source programs apply to new sources of pollution. *See* UARG Petition at 5-6.

In contrast to the statutory term "modification," EPA adopted the regulatory term "major modification" in 1976. The sole purpose of this regulatory term was to subject those "modifications" that were "major" to more stringent requirements than applied to those "modifications" that were not "major." Thus, EPA defined a "major modification" subject to NSR as "a modification . . . which increases the allowable emission rate" above specified tonnage thresholds, based on the addition of emissions increases and decreases across all emitting equipment at the stationary source at which the "modified" piece of equipment was located. 41 Fed. Reg. 55,528 (1976). In this way, a modified piece of equipment would *not* trigger NSR if any emissions increase from that modified equipment was offset (in tons per year) by emissions decreases at other, unmodified equipment at the stationary source.

Consistent with EPA's 1976 definition of "major modification," both EPA and the courts have repeatedly recognized that the regulatory concept "major modification" is a subset of

the statutory concept "modification." For example, in the 1979 nonattainment NSR rule, EPA explained that "the state plan requirements for major modifications may exempt modifications . . . that are accompanied by intrasource offsets so that there is no net emissions increase [from the source as a whole]." 44 Fed. Reg. 3276-77 (1979). In *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), the D.C. Circuit explained that "[s]tandards for PSD construction of facilities apply also to the 'modification' of any source or facility, [footnote omitted] as defined by section 111(a)(4) . . . . By regulation, EPA has limited PSD review to *only those modifications deemed 'major'*." 636 F.2d at 350 (emphasis added).

In the 1980 PSD rules defining "major modification," EPA explained that "[t]he applicability of the PSD regulations to modifications mirrors that for new sources . . . PSD review will apply to any modification . . . *if* the modification would result in a significant net increase [from the source as a whole]." 45 Fed. Reg. 52,710-11 (1980) (emphasis added). In *Chevron*, this Court upheld NSR rules under which "an existing plant that contains several pollutant emitting devices *may . . . modify one piece of equipment* without meeting permit conditions if the alteration will not increase total emission from the plant [*i.e.*, if the 'modification' does not constitute a 'major modification']." 467 U.S. at 840 (emphasis added).

In short, just as one cannot have a "major source" unless there is a "source" in the first place, one cannot have a "major modification" unless there is a "modification" in the first place. *See, e.g.*, 40 C.F.R. § 52.21(r)(4)("At such time that a particular source or modification becomes a major source or modification . . . the [NSR] requirements of paragraphs (j) through (s) of this section shall apply.").

Respondents substitution of "modification" for "major modification" demonstrates why *Environmental Defense* is relevant here. In that case, the petitioners argue that, contrary to EPA's explanation of the "major modification" rule in the rule's preamble (quoted above), the 1980 "major modification" rule should be interpreted to eliminate "modification" as

the trigger for PSD pre-construction review at existing sources. By comparison, the D.C. Circuit in *New York II* found that the CAA *precludes* EPA from promulgating an NSR rule that uses "modification" as the trigger for PSD pre-construction review. *See* Opp. at 6-7 (The lower court found "under *Chevron*'s first step . . . that Congress clearly intended the definition of modification to encompass equipment replacement activities" that are not NSPS modifications.).

As a result, Respondents' contention that *New York II* involves merely an "unexceptional, case-specific application" of *Chevron* is belied by Respondents' own argument. If the Court accepts Duke Energy's argument in *Environmental Defense* that the statute requires NSPS modification as the trigger for NSR preconstruction review (or even if it concludes that the statute just authorizes that result), the Court should grant certiorari and summarily remand this case for further proceedings consistent with that decision.

II. THE 1977 CAA AMENDMENTS RATIFIED THE POLICY REFLECTED IN EPA'S PREEXISTING NSPS AND PSD MODIFICATION DEFINITION.

The definition of "modification" and the new source review provision enacted in 1970, CAA § 111, § 110(a)(2)(D), reflected congressional policy to apply new source programs to activity that creates a new source of pollution. *See* UARG Petition at 5-6. EPA implemented the statutory term "modification" by regulation following the 1970 CAA to reflect this congressional policy, by defining "modification" as an activity that expands a source's capacity to emit, measured as an emission rate unaffected by hours of operation. *Id.* at 6-8.

As EPA explains in its petition for certiorari, Congress ratified this congressional policy when it amended the CAA in 1977. EPA Petition at 15-19. Indeed, immediately following the 1977 CAA, and repeatedly thereafter, EPA explained Congress's action in 1977 as ratifying the pre-existing "modi-

fication" regulations. *See, e.g.*, 43 Fed. Reg. 26,394 (1978); *Alabama Power*, 636 F.2d at 402.

Despite this history, Respondents now argue that Congress in 1977 *rejected* the policy it adopted in 1970 as implemented by EPA through the NSPS and PSD modification regulations. Opp. at 12-14. In particular, Respondents dispute that Congress, in enacting the 1977 CAA Amendments, "had before it EPA's preexisting PSD rules," and "reviewed those rules provision-by-provision, adopting some elements and changing others." UARG Petition at 16; Opp. at 13.

To the contrary, as UARG explains in its petition, it is clear on the face of the 1977 CAA Amendments that Congress told EPA *not* to change the way it implemented CAA § 111(a)(4)'s definition of "modification" under the 1974 PSD rules, a definition consistent with the NSPS definition. For example, with respect to such terms as "commence construction" and "best available control technology," Congress in 1977 specifically directed EPA to change its regulatory definition. This underscores that Congress (i) understood what was in the 1974 PSD rules; (ii) knew what it wanted EPA to keep and what it wanted EPA to change about those rules; and (iii) knew how to communicate its intent in unmistakable statutory terms. *Compare* 42 U.S.C. §§ 7479(2)(A), (3); CAA §§ 169(2)(A), (3) *with* 40 C.F.R. §§ 52.01(f); 52.21(b)(7) (1974).

Moreover, Congress provided that the 1974 PSD rules were to continue in effect in each state until such time as the state adopted an implementation plan that met the new PSD requirements established by the 1977 CAA Amendments. *See* 42 U.S.C. § 7478(a); CAA § 168(a). At the same time, Congress specifically directed that certain portions of the 1974 PSD rules were to be revised, effective immediately (*e.g.*, new PSD increments, the definition of "commence"), and others were to be changed at the time state implementation plans were revised (*e.g.*, the definition of "best available control technology"). *See* 42 U.S.C. § 7478(b); CAA § 168(b). The 1974 PSD rules' definition of "modification" was, of course, *not* among the provisions so revised by operation of statute or

required to be revised subsequently by the states. To the contrary, Congress directed that "modification" for NSR "means the same . . . as used in [CAA § 111(a)]." 42 U.S.C. § 7501(4); *see id* § 7479(2)(C).

In this manner, Congress made it clear that, at the very least, EPA had discretion to continue to implement the concept of "modification" as the "construction" trigger under the PSD program, consistent with the way EPA had always implemented "modification" under the NSPS program. *Cf.*, *e.g.*, *Lorillard v. Pons*, 434 U.S. 757, 582 (1978) (the "selectivity that Congress exhibited in incorporating provisions and modifying certain FLSA practices [in the ADEA] strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA [into the ADEA]."). Given this, the D.C. Circuit's conclusion in *New York II* that a statutory fragment, the words "any physical change" in CAA § 111(a)(4), deprives EPA of all discretion to adopt a rule that is consistent with the NSPS definition of modification defies explanation.

For their part, Respondents offer no explanation. Rather, ignoring an extensive discussion of the CAA and its history summarized above, *see* UARG Petition at 6-9, 16-18, they incorrectly assert that UARG has "cite[d] nothing in the language" of the CAA or in the legislative history of the 1977 CAA Amendments to support the notion that Congress in 1977 legislated in reference to the 1974 PSD rules. Opp. at 13. Further, Respondents dismiss CAA § 168(a) as a "savings clause," and on this basis argue that reliance on it is misplaced. *Id.*

Respondents' ahistorical suggestion that EPA's 1974 PSD program did not provide the starting point for Congress's adoption of a new statutory PSD program in 1977, and that Congress did not legislate in direct reference to those preexisting rules, does not withstand scrutiny.[2] Similarly misplaced

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[2] *See, e.g.*, *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 851-52 & n.8 (D.C. Cir. 1979); *see also id.* at 899 (J. Robinson, dissenting on

is their attempt to downplay the significance of CAA § 168(a) by mischaracterizing it as a mere "savings clause."[3]

As for the claim that CAA § 168(a) "refutes" UARG's position by supposedly indicating that Congress intended that the 1974 PSD rules continue to apply "only provisionally" (*i.e.*, until such time as a given state adopted a revised implementation plan), Opp. at 14, Respondents' argument begs the question. Indisputably, Congress intended that certain changes in the PSD program take place immediately and that others await the revision of implementation plans. And it specified in the statute *which* changes were to take place immediately (*e.g.*, new PSD increments, new definition of "commence") and which changes were to await the revision of implementation plans (*e.g.*, the definition of "best available control technology").

The point Respondents miss is that nowhere on the face of the 1977 CAA Amendments did Congress instruct EPA to change its regulatory definition of "modification." Quite the contrary: Congress specified that "modification" for NSR

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other grounds) ("[I]n passing Part C of Title I of the Clean Air Act, Congress was essentially codifying, revising and strengthening" the 1974 PSD rules); *Alabama Power Co. v. Costle*, 636 F.2d 323, 349 (D.C. Cir. 1979) (while the 1977 CAA Amendments made "substantial changes in the requirements governing" state implementation plans, the Amendments "maintain[ed] the basic structure of regulation of stationary sources" under the 1974 PSD rules).

[3] *See Citizens to Save Spencer County*, 600 F.2d at 861 (rejecting the environmental groups' description of CAA § 168(a) as being "no more than a routine 'savings clause' designed to ensure that there is no general lapse in the applicability of [the 1974 PSD rules] while state environmental plans undergo revision to implement the new federal regulations of 1977," given that (i) *another* provision of the 1977 CAA Amendments (*i.e.*, § 406(b)) served as a generic savings provision; and (ii) CAA § 168(a) was "specifically targeted" under Part C of the CAA to deal with the so-called "interim period" before a given state would have revised its implementation plan to conform to the new requirements of the CAA, which did not involve a change to the definition of "modification."

would have the same "mean[ing] and "use[]" it has under NSPS. 42 U.S.C. §§ 7479(2)(C); 7501(4).

In its petition, UARG observed that it would be a "particularly odd approach to statutory interpretation to conclude that, by defining 'modification' for NSR to mean 'modification' as defined in NSPS, Congress intended to *preclude* EPA from implementing CAA § 111(a)(4) for NSR the same way it had always implemented that provision for NSPS." UARG Petition at 17 (emphasis in original). The extraordinary response by both Respondents and the D.C. Circuit is, apparently, "no, not at all." A *Chevron* step one reading based on an *ipse dixit* transforms a reviewing court into a policy maker. Given the importance of NSR as the gateway to economic development in this country, certiorari should be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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